

# **AN UPDATE ON PROFESSIONAL RESPONSIBILITY IN MENTAL COMMITMENT CASES: KGF AND BEYOND**

Melissa Edwards – Attorney  
Office of the Public Defender

# Time—It's not on our side. Do you want it good or fast?

- In many jurisdictions, attorneys have very little time to do any preparation before the initial appearance and still others even before the trial or hearing on the merits.

# Time Dilemma

- KGF, 2001 MT 140; 306 Mont. 1; 29 P.3d 485 (2001), encourages attorneys to freely and liberally request a reasonable amount of time for investigation and case preparation.
- If we request additional time, our clients remained detained, locked in facilities where they don't want to be and which they are fighting to get out of.

# Audio-visual communication

## Effective 10-1-09

- **Section 53-21-140, M.C.A.** has been amended to leave it to the Court's discretion as to whether the initial hearing is held via audio-video communication. The Respondent/ Respondent's counsel no longer have the right to object, but the professional person may object. However, the Respondent may object to the use of audio-video communication in any subsequent proceeding.



# Diversion to short-term inpatient treatment

Amendments to Sections 53-21-122, 53-21-123 and 53-21-162, M.C.A.-- Effective July 1, 2009

- Section 53-21-122, M.C.A. has been amended to require at the initial hearing that when a Respondent is advised of his/her rights, they must also be advised that when the professional person issues a report regarding their examination, the professional person must include in the report a recommendation about whether the respondent should be diverted from involuntary commitment to short-term inpatient treatment.

# Diversion to short-term inpatient treatment (continued)

Amendments to Sections 53-21-122, 53-21-123 and 53-21-162, M.C.A.-- Effective July 1, 2009

- Section 53-21-123, M.C.A. has been amended to provide that the professional person appointed to conduct the evaluation must include in his/her report a recommendation about whether the Respondent should be diverted from involuntary commitment to short-term inpatient treatment. If the professional person recommends diversion from involuntary commitment to short-term inpatient treatment, the court must suspend the commitment hearing, unless the county attorney or respondent's counsel objects within 24 hours of receiving notice of the professional person's recommendation.

# Attorney Client Relationship

- MRPC 1.2(a) states that an attorney shall abide by the client's decisions concerning objectives of their representation and must consult with the client regarding the means by which these are pursued.
- Rule 1.14—An attorney representing a client that is mentally ill or under some disability must maintain a normal attorney-client relationship as far as reasonably possible, even when the client's ability to make decisions is impaired.



# Role of the Friend of Respondent

- Section 53-21-122(a), M.C.A. previously required the court to appoint a friend of respondent. The amended version of this statute, which became effective March 25, 2009, makes the appointment of a friend discretionary.



# Role of the Friend of Respondent

(continued)

- The new version of § 53-21-122 reads:

"If the court finds that an appropriate person is willing and able to perform the functions of a friend of respondent as set out in this part and the respondent personally or through counsel consents, the court shall appoint the person as the friend of respondent. The friend of respondent may be the next of kin, the person's conservator or legal guardian, if any, representatives of a charitable or religious organization, or any other person appointed by the court. Only one person may at any one time be the friend of respondent within the meaning of this part. The court may at any time, for good cause, change its designation of the friend of respondent. The court shall change the designation of the friend of respondent at the request of the respondent or if it determines that a conflict of interest exists between the respondent and the friend of respondent."

# **Role of the Friend of Respondent (continued)**

**Section 53-21-102(8), M.C.A. as amended effective March 25, 2009, defines the friend as:**

- "[A]ny person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including consultation with legal counsel and others."

# Role of the Friend of Respondent (continued)

- The friend is there to help the Respondent in dealing with the legal proceedings, including consultation with legal counsel and others. See In re D.V., 2007 MT 351, P34; 340 Mont. 319, P34; 174 P.3d 503, P34.
- JDL, 2008 MT 445 and ASF, 2008 MT 450, trial court committed reversible error by not appointing a friend of Respondent.

However, given the amendment to Section 53-21-122, appointment of a friend is no longer mandated by statute.



# Role of the Friend of Respondent (continued)

## Who should serve as friend?

- In re D.V., 2007 MT 351

Court ruled during trial that it was a conflict for the Respondent's mother, who had been appointed to serve as friend, to testify against him, and sustained counsel's objection to her testimony. However, on appeal, commitment was overturned because trial just failed to appoint another person to serve as friend when it was determined that the friend was also the complaining witness who had initiated the Petition against Respondent and thus had a conflict of interest.





The End.